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IN THE

Supreme Court of the United States

No. [redacted] 9

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,
Appellants,

v.

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Appellee, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, moves that the final judgment of the District Court be affirmed or in the alternative, that this appeal be dismissed.

Statutes Involved

Section 193 of the Agriculture and Markets Law of the State of New York; The Poultry Products Inspection Act; Regulations 221.40 and 221.9(c) of the Department of Agriculture and Markets of the State of New York; and §§81.125, 81.127, 81.130 of 7 C.F.R. all of which are set forth in Appendix B of appellants' Jurisdictional Statement.

Questions Presented

The only question that the Court below thought warranted consideration is—Does the Supremacy Clause preclude the appellee from enforcing against appellants, interstate packers, a state statute and regulation dealing with "net weight" (Agriculture and Markets Law § 193, Regulation 221.40), which requires that the net weight of the poultry be separately stated from the total weight of the stuffed bird, where appellants have received approval from an administrative officer of the United States Department of Agriculture of a label bearing only the total weight of the stuffed bird? The federal statute (Poultry Products Inspection Act, 21 U.S.C. §§ 451-469, 71 Stat. 441-49), enacted by Congress solely to prevent unadulterated and unwholesome poultry products from being shipped in interstate commerce, requires that "the net weight or other appropriate measure of the contents" be stated (§ 8(a) Labeling).

A procedural question must first be resolved as it appeared doubtful that a three-judge court was properly convened.

Statement of the Case

Appellants, having their plants outside the State of New York, pack and ship frozen stuffed turkeys into this State where they are sold to retailers who, in turn, offer them for sale to the public. These turkeys are labeled by appellants so as to show only the total weight of the entire stuffed bird.

Section 193-3 of the Agriculture and Markets Law of the State of New York provides that "[a]ll food and food products offered for sale at retail * * * shall be sold or offered for sale by net weight. * * *" The only comparable reference in the Federal Poultry Products Inspection Act

is found in § 8(a) of said Act which deals with the labeling requirements on products bearing the inspection mark of the United States Department of Agriculture. Included therein is the proviso that the label set forth "the net weight or other appropriate measure of the contents" of the product.

Appellants contend that having received a federally approved label stating the total weight of a stuffed turkey, they are entitled to bar appellee from enforcing against appellants a State regulation which requires in selling stuffed turkeys at retail, *separate statements as to the actual weight of the turkey and the combined weight of stuffed bird.* Since both Federal and State statutes refer to "net weight", the controversy arises over the interpretation of the term "net weight" by the appellee. Appellee's interpretation is based on Governor Rockefeller's message in vetoing legislation that would have permitted the sale of meat and poultry, etc., at retail by total weight rather than net weight. In his veto message dated April 30, 1963 in connection with Assembly Bill, Introductory No. 3782, entitled "AN ACT to amend the agriculture and markets law, in relation to the method of sale of meat, poultry and seafood", he stated:

"NOT APPROVED

This bill would authorize the sale by total weight rather than net weight of meat, poultry or seafood combined with other food elements, such as stuffing.

At present, sellers are required to list separately the net weight of the meat, poultry or seafood in such combination food products. This bill would thus leave the consumer without knowledge of the separate weight of the major component of the meat, poultry or seafood combination. The consumer should not be deprived of this basic information when purchasing stuffed poultry and other prepared items.

Disapproval is recommended by the Attorney General, the Mayor of the City of New York and the association of the Bar of the City of New York. In recommending disapproval the Attorney General notes:

> 'The subject bill deprives the consumer of the essential knowledge of what he is buying, and opens wide the door to misrepresentation and deception in the sale of these most vital food items.'

The bill is disapproved."

In carrying out the Governor's intention as expressed in his veto message, the appellee has construed Regulation 221.40 to require that all stuffed poultry sold at retail in New York must have a label affixed, separately stating the net weight of the poultry without stuffing and the total net weight of the stuffed bird. Appellants' argument that the *federal* interpretation of the term "net weight" was based on concern for the wholesomeness of stuffed poultry shipped in interstate commerce was rejected by the lower Court "as wholly contrary to the evidence" (35).*

At the trial, appellee showed that the United States Department of Agriculture had no fixed policy on weight labelling and that in two specific instances it had approved labels which permitted interstate shippers to comply with New York's weight statute and regulation. Appellants' witness, an official of the Poultry Division of the United States Department of Agriculture, admitted that on one occasion his Department had approved labels for stuffed rock cornish game hen which stated the net weight of cornish hen and the total weight with the stuffing (S.M., pp. 171-175). The same witness conceded that the Meat Division of the United States Department of Agriculture had permitted labels giving the net weight of garnished ham and the total weight of the ham (S. M., pp. 192, 193).

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* Figures in parenthesis refer to pages in appellants' Jurisdictional Statement unless otherwise indicated.

Opinion Below

The Court rejected as insubstantial, appellants' contention that appellee's regulation dealing with weights was an impermissive interference with appellants' constitutional right to ship their stuffed turkeys into New York State. Citing *Patapsco Guano Co.* v. *Bd. of Agriculture of North Carolina,* 171 U. S. 345 (1898) and *Savage* v. *Jones,* 225 U. S. 501 (1912), the Court held the State regulation reasonable and not an undue restraint on interstate commerce (25-27). Summarily dismissed as being totally lacking in substance was appellants' claim that the State regulation violated the Fourteenth Amendment (27).

The Supremacy issue was considered at length by the Court and likewise found to be without merit. Judge Friendly after a comprehensive and thorough analysis of the Congressional purpose behind the passage of the federal Poultry Products Inspection Act, concluded that Congress never intended to preempt "the states of their historic undertaking to safeguard their people from improper statements of weight" (34).

The Court below had no problem in deciding that a substantial federal question was not presented by appellants. It was, however, concerned with the question of the propriety of convening a three-judge district court in this case (pp. 40-42).

Argument

This Court's prior decisions confirm the lower court's opinion that there is no merit to appellants' contentions. The lower court properly held that the state's regulation with respect to stuffed poultry sold at retail was not rendered invalid by the Commerce Clause of the Constitution.

Appellants likewise recognize the State's inherent right to regulate weights and measures and concede that (12):

> "The District Court here was correct in concluding that 'the Framers of the Constitution' did not intend

> to divest the states of their historic power to protect the public against false weights and measures or misleading statements about them. Nor is it contended that the Congress, in enacting the Poultry Products Inspection Act, *supra*, intended such a divestment."

Appellants' argument that the federally approved label automatically permits a product bearing such label to enter any state without complying with the state requirements is untenable. In *Plumley* v. *Massachusetts*, 155 U. S. 461, 469 (1894), this Court stated:

> "The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?"

Neither *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, nor *McDermott* v. *Wisconsin*, 228 U. S. 115, cited by appellants, have any application to New York State's regulation dealing with the weight of poultry sold at retail and were distinguished by the Court below. These cases dealt with state statutes that specifically contravened federal statutes. In *Cloverleaf Butter Co.* v. *Patterson, supra*, the federal act supervised the entire process of renovated butter. In *McDermott* v. *Wisconsin, supra*, the state statute was held unconstitutional as it would have required that the federally approved label be removed at the time the package

entered the state and prosecution for a violation under the federal statute would be hindered. New York State, however, merely seeks to have a more informative label added to the package to protect its consumers from deceptive practices.

Appellants' argument that the Fourteenth Amendment is an effective bar to the state's weight regulation in that it favors domestic processors of stuffed turkeys, is so specious that the lower court refused to give it any consideration (27). It is obvious that the state's regulation as to weight, applies to *all* processors, domestic or foreign, who sell stuffed turkeys at retail in New York State. Appellants concede at page 16 of their Jurisdictional Statement that the Equal Protection provision of the Fourteenth Amendment has no application where the state statute and regulation apply uniformly.

Appellants' contention that New York State's regulations as to weight, violates the Supremacy Clause of the Constitution, is unfounded. The applicability of the Supremacy Clause to the states in the exercise of their police power has heretofore been clearly defined by this Court. There is no repugnance or conflict between the two acts so that they cannot be reconciled or consistently stand together. *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132 (1963); *Kelly* v. *Washington,* 302 U. S. 1, 10 (1937); *California* v. *Zook,* 336 U. S. 727 (1949); *Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440 (1960).

In *Florida Avocado* v. *Paul, supra,* this Court considered a state statute which barred the entry into California of Florida avocados that had received approval from federal authorities for interstate shipment pursuant to federal statute and regulations. This Court there held:

1. The state law was not invalid under the Supremacy Clause as both state and federal regulations could be complied with.

2. The subject matter of the state regulation was one traditionally within the scope of the power of the states to prevent deception in the retail marketing of food.

3. The history of the federal act did not disclose a Congressional purpose to displace traditional state powers to regulate the retail sale of food.

4. The Equal Protection clause of the Fourteenth Amendment was not violative because the state law did not discriminate between outside groups and local groups.

Appellants' attempt to differentiate the *Florida Avocado* case is specious (8-10) in view of the specific finding by the lower court from the evidence adduced at the trial, that dual compliance would not be difficult and that Congress in enacting the Poultry Inspection Act was not concerned with the weight of poultry as "[p]assage of the Act did not result from any belief on the part of Congress that there were serious weight or labelling abuses demanding correction; neither the legislative findings nor the declaration of policy make any reference to these subjects. In the entire statute, stretching over nine pages in the Statutes at Large, the sole reference to disclosure of weight consists of one short clause. The House Report, No. 465, 85th Cong., 1st Sess. 1957; 2 U. S. Code Cong. & Adm. News 1957, pp. 1632-33, and the Senate Report, No. 195, 85th Cong., 1st Sess., 1957, say nothing on the subject save for a passing mention of a statement of "the quantity" in paraphrasing the labelling section where this clause appears"(35).

Appellants' further argument that the additional label necessary to conform with New York's weight regulations would not receive federal approval, is premature as appellants have concededly never sought federal approval of a stuffed turkey package containing a supplementary label carrying the additional information required by New York Law and, as Judge Friendly observed, the addition of such a supplementary label would not be unlawful (38).

The opinion below is justly critical of appellants' failure to request a hearing after a federal subordinate official without justification rejected appellants' label (39). Appellants' cavalier attitude toward obtaining federal approval of a label complying with the State's weight regulations (17) comes as no surprise, as it is quite obvious that appellants never intended to comply with New York State's weight regulations and merely went through the motions of submitting labels for federal approval, expecting disapproval.

The lower Court was unsure that this case warranted the convening of a three-judge court pursuant to 28 U.S.C. 2281 (40-42). As a result, the three-judge Court as well as the District Judge acting singly, made identical orders in this matter and an appeal is pending in the United States Court of Appeals pending disposition by this Court.

Appellee originally opposed appellants' motion for a three-judge Court on the ground that the constitutional issues posed by them were lacking in substantiality and that the complaint merely sought to mitigate the affect of appellee's interpretation of a state statute and regulation in its application to appellants' shipment of stuffed turkeys into New York State. Appellants are not seeking to have the state statute declared unconstitutional, only to bar appellee from enforcing against them the state regulation on the basis of the Supremacy Clause. In *Ex parte Bransford,* 310 U. S. 354, 361 (1940), this Court under similar circumstances which would appear to be applicable here, stated that a three-judge court was not required. The Court held:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack

is aimed at an allegedly erroneous administrative action. Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction." (Citing *Stratton* v. *Southwestern Ry.*, 282 U. S. 10, 15)

Conclusion

The District Court correctly determined the issues involved. This appeal presents no substantial constitutional question. The judgment of the United States District Court should be affirmed or the appeal dismissed.

Dated, New York, November 2, 1964.

Respectfully submitted,

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